Rahaya bt Salleh (administratrix for the estate and dependant of Kamarulnizam bin Ismail, deceased) v Nik Mohd Ghazali B Nik Zul Azhar & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-01(NCVC)(W)-463–09 OF 2019 AND A-01(NCvC)(W)-71–02 OF 2020

YAACOB MD SAM, AHMAD NASFY AND GUNALAN MUNIANDY JJCA

26 MAY 2022

Tort — Negligence — Duty of care — Deceased died in prison — Whether detention of deceased was legal — Whether defendants negligent in causing death of deceased — Whether claim for dependency and special damages ought to be allowed

The plaintiff's son ('the deceased') was arrested by the police on 13 February 2014 under the Minor Offences Act 1955 in respect of some stolen property and under s 457 of the Penal Code. On 14 February 2014, the fifth defendant produced the deceased before a magistrate and a remand order was obtained until 18 February 2014 to facilitate police investigations ('the first remand'). Subsequently, the deceased was further remanded 21 February 2014 ('the second remand'). However, the deceased was re-arrested on that very day by SD3 as the deceased was suspected of committing an offence under s 457 of the Penal Code. On 22 February 2014, he was produced before a magistrate for another remand ('the third remand') until 25 February 2014. On 25 February 2014 he was again re-arrested for the third time by SD5 where he was then taken and detained at Jinjang, Kuala Lumpur police lockup. He was then produced before a magistrate the following day that was 26 February 2014 and a remand until 28 February 2014 was ordered ('the fourth remand'). Upon expiry of the fourth remand order, he was re-arrested again, brought before a magistrate on 1 March 2014 and was remanded until 4 March 2014 ('the fifth remand'). On 4 March 2014, the deceased was charged under s 29 of the Minor Offences Act 1955 and s 89 of the Police Act 1967 to both of in which he pleaded guilty to both charges and was sentenced to a fine of RM800 in default thereof for an imprisonment term of seven days for the first charge and RM400 in default thereof for an imprisonment term of seven days for the second charge. The deceased was ordered to be held at the Tapah Prison for failing to pay the fine of RM800 imposed on him. The police continued to keep him in the Seberang Perai police lockup and he was eventually handed over to Tapah Prison on 6 March 2014. He was then brought to see SD18 who was a medical officer on duty at the Klinik Kesihatan Penjara Tapah. The deceased

complained that he was having diarrhoea and SD18 prescribed medication to him. SD18 was of the view that the deceased was 'clinically fit and mentally stable'. On the night of 7 March 2014, the first defendant and another warden were in charge of guarding the cell where the deceased was held. On 8 March 2014 at around 6.15am, a prisoner informed the first defendant that the deceased was found in state of unconsciousness. The first defendant immediately informed SD13 who arrived at the cell at about 6.25 am. SD13 discovered that the deceased was sprawled with his face down on the prison floor. There was no medical officer on duty at that time. The deceased was then sent to the Tapah Hospital. SD16 who was the doctor on duty at Tapah Hospital confirmed that he received the body of the deceased at about 7.20am and the deceased was already dead. The body of the deceased was brought to the Forensic Unit of Tapah Hospital for post mortem which was then conducted by SD19 where it was reported that, inter alia: (a) the deceased died between 8.30pm on 7 March 2014 to 2.30am 8 March 2014; and (b) the cause of death was said to be due to chest infection. The plaintiff claimed against the defendants were as follows: (i) that the arrest and detention of the deceased were unlawful; (ii) the eighth defendant was negligent in his duties of care in the police lockup; (iii) the first to fourth defendants were negligent in their duties in Tapah Prison; (iv) the ninth defendant was negligent in his duties investigating the cause of death of the deceased; and (v) the tenth to twelfth defendants were negligent in their duties in supervising or controlling the officers under them. At the High Court, the learned judicial commissioner ('JC') had allowed the plaintiff's claim in part. Hence, these two appeals. In Appeal No 463, the plaintiff appealed against a portion of the decision: (A) dependency claim; (B) claim for special damages; (C) claim for exemplary and aggravated damages; and (D) amount of costs. In Appeal No 71, the defendants appealed against the finding of liability.

Held, allowing Appeal No 463 and dismissing Appeal No 71:

(1) The plaintiff did not pray for any declaratory relief that the arrest and detention were unlawful. The plaintiff merely averred on the unlawfulness of the arrest and/or detention but the particulars on the unlawfulness of the arrest and detention were not pleaded in the statement of claim. Accordingly, where the trial court went beyond what was claimed in the statement of claim, then the judgment being contrary to the pleading become untenable in law and liable to be set aside (see para 36).

(2) The plaintiff had established that there was a duty of care owed by the respective defendants to the deceased and that the defendants had breached that duty. Not an iota of evidence that the deceased was examined by a medical officer when he was first detained at the lockup. There was nothing by way of explanation by the defendants why such medical examination could not be provided. The first to fourth

defendants had breached both their common law duty of care and the statutory duty imposed on them whilst the deceased was in Tapah Prison. They were negligent in their performance of their public duty by omission to ensure the medication prescribed would reach the deceased and no attempt was made to give the deceased emergency treatment. The deceased's illness of 'radang paru-paru' could not just develop in one night. The deceased had been deprived of any medical attention contrary to the provision of r 10 of the Lockup Rules 1953. Thus, the fifth defendant had breached the duty of care which was owed to the deceased due to his negligence in failing to provide a medical officer to examine him upon his confinement in the lockup and to keep proper observation on him to ensure his good health. The tenth to thirteenth defendants were found to be vicariously liable for the conduct of the first to fifth defendants. The award of RM250,000 as damages was appropriate (see paras 45, 50, 53 & 55–56).

(3) The evidence that the deceased had indeed been gainful employed and was earning RM2,500 a month as provided by s 7(3)(iv) of the Civil Law Act 1956, was substantiated by the contemporaneous document produced during the trial. Therefore, the learned JC had erred in his finding that the deceased was not employed. Just because the earning did not command a monthly salary of RM2,500 the plaintiff's evidence that the deceased gave her and her husband a monthly subsistence should not be disbelieved at all. There had been insufficient judicial appreciation of the evidence when the learned JC decided against awarding any sum for dependency to the plaintiff. The sum of RM1,500 would be the likely monthly income of the deceased. Therefore, the figure of RM212.50 per month was reasonable for the dependency claim. The plaintiff no doubt had spent some money as costs for travelling to and from Penang as well as for other matters pertaining to the deceased's death. This would necessarily include all the expenses in obtaining the letters of administration, obtaining reports and so on. As such the sum of RM10,000 for special damages was reasonable. The costs awarded by the learned JC was inordinately low compared to the amount of time and expenses that had been incurred by the plaintiff in pursuing his claim. Therefore the order of costs made by the trial judge was set aside and a sum of RM30,000 was fair and reasonable in the circumstances (see paras 59–61, 63 & 66).

[Bahasa Malaysia summary

Anak plaintif ('si mati') telah ditangkap oleh polis pada 13 Februari 2014 di bawah Akta Kesalahan-Kesalahan Kecil 1955 berkenaan dengan beberapa harta curi dan di bawah s 457 Kanun Keseksaan. Pada 14 Februari 2014, defendan kelima mengemukakan si mati di hadapan majistret dan perintah reman diperoleh sehingga 18 Februari 2014 untuk memudahkan siasatan polis

('reman pertama'). Selepas itu, si mati ditahan reman selanjutnya pada 21 Februari 2014 ('reman kedua'). Bagaimanapun, si mati telah ditahan semula pada hari itu juga oleh SD3 kerana si mati disyaki melakukan kesalahan di bawah s 457 Kanun Keseksaan. Pada 22 Februari 2014, dia dibawa di hadapan majistret untuk satu lagi reman ('reman ketiga') sehingga 25 Februari 2014. Pada 25 Februari 2014 dia sekali lagi ditahan semula buat kali ketiga oleh SD5 di mana dia kemudiannya dibawa dan ditahan di Jinjang, lokap polis Kuala Lumpur. Dia kemudiannya dibawa di hadapan majistret pada hari berikutnya iaitu 26 Februari 2014 dan reman sehingga 28 Februari 2014 telah diperintahkan ('reman keempat'). Selepas tamat perintah reman keempat, dia ditahan semula sekali lagi, dibawa ke hadapan majistret pada 1 Mac 2014 dan direman sehingga 4 Mac 2014 ('reman kelima'). Pada 4 Mac 2014, si mati didakwa di bawah s 29 Akta Kesalahan-Kesalahan Kecil 1955 dan s 89 Akta Polis 1967 di mana dia mengaku bersalah atas kedua-dua pertuduhan dan dijatuhkan hukuman denda RM800 jika ingkar penjara tempoh tujuh hari bagi pertuduhan pertama dan RM400 jika ingkar penjara tujuh hari bagi pertuduhan kedua. Si mati diperintahkan ditahan di Penjara Tapah kerana gagal membayar denda RM800 yang dikenakan ke atasnya. Polis terus menahannya di lokap polis Seberang Perai dan akhirnya diserahkan ke Penjara Tapah pada 6 Mac 2014. Dia kemudian dibawa berjumpa SD18 yang merupakan pegawai perubatan yang bertugas di Klinik Kesihatan Penjara Tapah. Si mati mengadu dia mengalami cirit-birit dan SD18 mempreskripsikan ubat kepadanya. SD18 berpandangan bahawa si mati adalah 'cergas secara klinikal dan stabil dari segi mental'. Pada malam 7 Mac 2014, defendan pertama dan seorang lagi warden bertanggungjawab mengawal sel tempat si mati ditahan. Pada 8 Mac 2014 kira-kira jam 6.15 pagi, seorang banduan memaklumkan kepada defendan pertama bahawa si mati ditemui dalam keadaan tidak sedarkan diri. Defendan pertama segera memaklumkan SD13 yang tiba di sel kira-kira jam 6.25 pagi. SD13 mendapati si mati telah terlentang dengan mukanya di atas lantai penjara. Tiada pegawai perubatan yang bertugas ketika itu. Si mati kemudiannya dihantar ke Hospital Tapah. SD16 yang merupakan doktor bertugas di Hospital Tapah mengesahkan menerima mayat arwah kira-kira jam 7.20 pagi dan arwah sudah pun meninggal dunia. Mayat si mati telah dibawa ke Unit Forensik Hospital Tapah untuk bedah siasat yang kemudiannya dijalankan oleh SD19 di mana dilaporkan, antara lain: (a) si mati meninggal dunia antara jam 8.30 malam pada 7 Mac 2014 hingga 2.30 pagi 8 Mac. 2014; dan (b) punca kematian dikatakan berpunca daripada jangkitan pada paru-paru. Tuntutan plaintif terhadap defendan adalah seperti berikut: (i) bahawa penangkapan dan penahanan si mati adalah menyalahi undang-undang; (ii) defendan kelapan cuai dalam tugas penjagaannya di lokap polis; (iii) defendan pertama hingga keempat cuai dalam tugas mereka di Penjara Tapah; (iv) defendan kesembilan cuai dalam tugasnya menyiasat punca kematian si mati; dan (v) defendan kesepuluh hingga kedua belas cuai dalam tugas mereka dalam menyelia atau mengawal pegawai di bawah mereka. Di Mahkamah Tinggi, pesuruhjaya

kehakiman yang bijaksana ('PK') telah membenarkan sebahagian tuntutan plaintif. Oleh itu, kedua-dua rayuan ini. Dalam Rayuan No 463, plaintif merayu terhadap sebahagian keputusan: (A) tuntutan tanggungan; (B) tuntutan ganti rugi khas; (C) tuntutan untuk ganti rugi teladan dan ganti rugi teruk; dan (D) jumlah kos. Dalam Rayuan No 71, defendan merayu terhadap penemuan liabiliti.

Diputuskan, membenarkan Rayuan No 463 dan menolak Rayuan No 71:

(1) Plaintif tidak memohon untuk sebarang relif pengisytiharan bahawa penangkapan dan penahanan adalah menyalahi undang-undang. Plaintif hanya menegaskan mengenai tangkapan dan/atau penahanan yang menyalahi undang-undang tetapi butir-butir mengenai tangkapan dan penahanan tidak sah tidak diplidkan dalam pernyataan tuntutan. Sehubungan itu, apabila mahkamah bicara melampaui apa yang dituntut dalam pernyataan tuntutan, maka penghakiman yang bertentangan dengan pliding menjadi tidak boleh dipertahankan di sisi undang-undang dan boleh diketepikan (lihat perenggan 36).

(2) Plaintif telah membuktikan bahawa terdapat kewajipan berjaga-jaga perlu diberi oleh defendan kepada si mati dan bahawa defendan telah melanggar kewajipan itu. Tiada sedikit pun keterangan bahawa si mati telah diperiksa oleh pegawai perubatan ketika pertama kali ditahan di lokap. Tiada apa-apa penjelasan oleh defendan mengapa pemeriksaan perubatan sedemikian tidak dapat diberikan. Defendan pertama hingga keempat telah melanggar kedua-dua kewajipan berjaga-jaga *common law* mereka dan kewajipan berkanun yang dikenakan ke atas mereka semasa si mati berada di Penjara Tapah. Mereka cuai dalam melaksanakan tugas awam mereka dengan meninggalkan untuk memastikan ubat yang ditetapkan akan sampai kepada si mati dan tiada sebarang percubaan dibuat untuk memberi rawatan kecemasan kepada si mati. Penyakit radang paru-paru yang dihidapi si mati bukan hanya boleh berlaku dalam satu malam. Si mati telah dihalang daripada sebarang rawatan perubatan yang bertentangan dengan peruntukan k 10 Kaedah-Kaedah Lokap 1953. Oleh itu, defendan kelima telah melanggar kewajipan berjaga-jaga perlu diberi kepada si mati kerana kecuaiannya gagal menyediakan pegawai perubatan untuk memeriksanya semasa dia ditahan di lokap dan memberi pemerhatian yang sewajarnya ke atasnya bagi memastikan kesihatannya yang baik. Defendan kesepuluh hingga ketiga belas didapati bertanggungan secara vikarious bagi kelakuan defendan pertama hingga kelima. Award RM250,000 sebagai ganti rugi adalah wajar (lihat perenggan 45, 50, 53 & 55–56).

(3) Keterangan bahawa si mati memang telah bekerja dan memperoleh pendapatan RM2,500 sebulan seperti yang diperuntukkan oleh s 7(3)(iv) Akta Undang-Undang Sivil 1956, telah dibuktikan oleh

dokumen semasa yang dikemukakan semasa perbicaraan. Oleh itu, PK yang bijaksana telah terkhilaf apabila mendapati si mati tidak bekerja. Hanya kerana pendapatan itu tidak mendapat gaji bulanan RM2,500 keterangan plaintif bahawa si mati memberinya dan suaminya sara hidup bulanan tidak boleh disangkal sama sekali. Terdapat penghargaan kehakiman yang tidak mencukupi terhadap keterangan apabila PK yang bijaksana memutuskan untuk tidak memberikan sebarang jumlah tanggungan kepada plaintif. Jumlah RM1,500 adalah kemungkinan pendapatan bulanan si mati. Oleh itu, angka RM212.50 sebulan adalah munasabah untuk tuntutan tanggungan. Plaintif tidak syak lagi telah membelanjakan sedikit wang sebagai kos untuk perjalanan pergi dan balik dari Pulau Pinang serta untuk perkara-perkara lain yang berkaitan dengan kematian si mati. Ini semestinya termasuk semua perbelanjaan untuk mendapatkan surat pentadbiran, mendapatkan laporan dan sebagainya. Oleh itu, jumlah RM10,000 untuk ganti rugi khas adalah munasabah. Kos yang diawardkan oleh PK yang bijaksana adalah pada tahap yang rendah berbanding dengan jumlah masa dan perbelanjaan yang telah ditanggung oleh plaintif dalam meneruskan tuntutannya. Oleh itu perintah kos yang dibuat oleh hakim bicara telah diketepikan dan sejumlah RM30,000 adalah adil dan munasabah dalam keadaan tersebut (lihat perenggan 59–61, 63 & 66).]

Cases referred to

Anns v Merton London Borough Council [1978] AC 728, HL (refd)
Caparo Industries plc v Dickman and others [1990] 2 AC 605, HL (refd)
Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353; [2014] 9 CLJ 15, CA (refd)
Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141; [2018] 7 CLJ 403, FC (refd)
Heaven v Pender (1883) 11 QBD 503, CA (refd)
Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292; [2018] 1 CLJ 415, FC (refd)
Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365; [2021] 3 MLR 424, FC (refd)
Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734, FC (refd)
M'Alister (or Donoghue) v Stevenson [1932] AC 562, HL (refd)
Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh [1992] 1 MLJ 147, SC (refd)
PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477; [1997] 4 CLJ 702, CA (refd)
R (on the application of Amin) v Secretary of State for the Home Department [2003] 4 All ER 1264; [2003] UKHL 51, HL (refd)
Seven Seas Supply Co v Rajoo [1966] 1 MLJ 71, FC (refd)

Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] 4 SLR 100, CA (refd)
Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561; [2018] 6 CLJ 683, FC (refd)
Yuen Kun Yue v Attorney General of Hong Kong [1988] AC 175, PC (refd)

Legislation referred to

Criminal Procedure Code ss 117, 117(3), (4), (7), 119, 119(1), 282
Civil Law Act 1956 ss 7, 7(3)(iv), 8
Courts of Judicature Act 1964 Schedule, para 15
Interpretation Acts 1948 and 1967 s 54(2)
Lockup Rules 1953 r 10
Minor Offences Act 1955 s 29
Penal Code s 457
Police Act 1967 ss 89, 32
Prison Regulations 2000 regs 7, 18, 272

Appeal from: Civil Suit No AA-21NCvC-2–03 of 2017 (High Court, Ipoh)

M Visvanathan (with R Karnan and V Sanjay Nathan with him) (Saibullah MV Nathan & Co) for the appellant.
Andi Razalijaya bin A Dadi (with Azizan Md Arshad and Mohd Ashraf bin Abd Hamid) (Attorney General's Chambers) for the respondent.

Ahmad Nasfy JCA:

INTRODUCTION

[1] These two appeals were heard together, namely, No A-01(NCVC)(W)-463–09 of 2019 ('Appeal No 463') and A-01(NCVC)(W)-71–02 of 2020 ('Appeal No 71'). Both are interconnected and share common facts, issues, parties and are against the decision delivered by the learned judicial commissioner ('learned JC') in the High Court of Malaya in Ipoh, Perak on 13 August 2019.

[2] In Appeal No 463, the plaintiff appealed against a portion of the following decision:

(a) dependency claims pursuant to s 7 of the Civil Law Act 1956;

(b) claim for special damages as per plaintiff's statement of claim ('SOC');

(c) claim for exemplary and aggravated damages; and

(d) amount of costs awarded to the plaintiff.

[3] In Appeal No 71, the defendants appealed against the finding of liability.

[4] For the purpose of these appeals, parties will be referred to as they were in the High Court.

[5] We heard the appeal and after giving our most anxious and meticulous consideration to the facts and the submissions from the learned counsel for the plaintiff as well as the learned senior federal counsel ('SFC') for the defendants, we are satisfied that there are appealable errors in the High Court's decision warranting appellate intervention. It is our unanimous decision that the appeal by the plaintiff in Appeal No 463 is allowed partly with costs whilst in the Appeal No 77 by the defendants is dismissed with costs. The following are our grounds in arriving at the decision.

SALIENT FACTS

[6] The plaintiff's son Kamarulnizam bin Ismail ('the deceased') was arrested by the police at about 11.30am on 13 February 2014 under the Minor Offences Act 1955 in respect of some stolen property and under s 457 of the Penal Code. Upon his arrest, he was detained at the Ibu Pejabat Polis Daerah Seberang Prai Tengah Police lockup.

[7] On the 14 February 2014, at about 2.30pm, Sarjan Mejar Suhaimi bin Saidin Alias Saleh (SD2 and the fifth defendant) produced the deceased before a magistrate and a remand order was obtained until 18 February 2014 to facilitate police investigations ('the first remand'). The 'Waran Menahan' (D38) and 'Minit Permohonan Reman' and 'Permohonan Tahanan Reman OKT Di Bawah Seksyen 117 KPJ' (D37 collectively) were produced in court. The 'Permohonan Tahanan Reman' was prepared by SD2 himself. These were presented by SD2 together to the magistrate.

[8] Subsequently, the deceased was further remanded, from 18 February 2014 to 21 February 2014 ('the second remand'). The 'Permohonan Reman' (D39(b)) was also prepared by SD2.

[9] The second remand was to end on the 21 February 2014 and the deceased was supposed to be released. Alas, this was not to be. The deceased was re-arrested on that very day by one ASP Rizal bin Ramli. Sarjan Mohd Hafiz bin Abd Karim (SD3) stated in evidence that the deceased was suspected of committing an offence under s 457 of the Penal Code. On 22 February 2014, he was produced before a magistrate for another remand ('the third remand') from 22 February 2014 to 25 February 2014. The 'Waran Menahan' (D61), Permohonan Tahanan Reman OKT di bawah Sek. 117 KPJ' (D46(1)) and 'Minit Permohonan Reman' (D46(2)) were produced. D46(2) was prepared by Sarjan Mohd Khairie Anwar bin Azmi (SD4).

[10] On 25 February 2014 he was again re-arrested for the third time. He was arrested by Sarjan Kamarudin bin Hushin (SD5). This date is significant as the third remand for the deceased was to end on 25 February 2014. This time the deceased was then taken and detained at Jinjang, Kuala Lumpur police lockup (Pusat Reman Jinjang). He was then produced before a magistrate at Kuala Lumpur Magistrate Court the following day that is 26 February 2014 and a fourth remand from 26 February 2014 to 28 February 2014 was ordered (P31). The deceased was represented by the Yayasan Bantuan Guaman Kebangsaan's (YBGK's) lawyer (SP3) who evinced that the deceased told him, he was beaten by the police and showed him the bruises. Upon expiry of the remand order on 28 February 2014, he was re-arrested again, brought before a magistrate on 1 March 2014 and was remanded until 4 March 2014 (the fifth remand). Evidence showed that the deceased had been placed on a series of 'chain remand and road show' ending on 4 March 2014.

[11] On 4 March 2014, the deceased was charged under s 29 of Minor Offences Act 1955 and s 89 of the Police Act 1967 to both of in which he pleaded guilty to both charges and was sentenced to a fine of RM800 in default thereof for an imprisonment terms of seven days for the first charge (failure to give account of article believed to be a stolen property) and RM400 in default thereof for an imprisonment term of seven days for the second charge (unlawful possession of a police emblem).

[12] The deceased was ordered to be held at the Tapah Prison for failing to pay the fine of RM800 imposed on him. The police in this case had instead of taken him to Tapah Prison had continued to keep him in the Seberang Perai police lockup. He was eventually handed over to Tapah Prison on 6 March 2014. He was then brought to see SD18 who was a medical officer on duty at the Klinik Kesihatan Penjara Tapah. The deceased complained that he was having diarrhoea and SD18 prescribed medication to him. SD18 was of the view that the deceased was 'clinically fit and mentally stable'.

[13] On the fateful night of 7 March 2014, SD12 (D1) and one Mohd Zaki, another warden, were in charge of guarding cell G4 at Blok Insaf Tapah Prison where the deceased was held. According to SD12, Block Insaf was occupied by 154 prisoners. There were about 30 prisoners held in cell G4 of Blok Insaf at the material time. The situation was fully under control. The frequency of rounds that each warden had to make was once in every 30 minutes.

[14] On 8 March 2014, at around 6.15am, a prisoner informed SD12 that the deceased was found in state of unconsciousness. Upon being told, SD12 immediately informed SD13 who arrived at the cell at about 6.25am. SD13 discovered that the deceased was sprawled with his face down on the prison

floor. There was no medical officer on duty at that time. The deceased was then sent to the Tapah Hospital.

[15] SD16 who was the doctor on duty at Tapah Hospital confirmed that he received the body of the deceased at about 7.20am and the deceased was already dead. At around 8.30am, the body of the deceased was brought to the Forensic Unit of Tapah Hospital for post mortem which was then conducted by SD19.

[16] Dr Siti Zanariah bt Mohd Nazami (SD19) in her report marked P9 revealed the following:

(a) the deceased died some six to 12 hours before being brought to Forensic Unit indicating that he died between 8.30pm on 7 March 2014 to 2.30am, 8 March 2014;

(b) the deceased did not have bruises nor was there any evidence of the deceased being beaten. As to the marks or discoloration on the deceased body she explained that this was due to lividity or 'lebam mayat'. The differences between a bruise mark and a 'lebam mayat' was explained;

(c) blood and urine samples were taken from the deceased. The samples did not show anything abnormal; and

(d) the cause of death was said to be due 'Jangkitan pada Paru-Paru (Chest Infection)'. She added that the deceased was suffering from chronic lung infection which meant that the illness had been there for some time.

[17] Premised on the aforesaid facts, the plaintiff claimed against the defendants are as follows:

(a) that the arrest and detention of the deceased were unlawful;

(b) the eighth defendant was negligent in his duties of care in the police lockup;

(c) the first to fourth defendants were negligent in their duties in Tapah Prison;

(d) the ninth defendant was negligent in his duties investigating the cause of death of the deceased; and

(e) the tenth to 12th defendants were negligent in their duties in supervising or controlling the officers under them.

[18] The plaintiff therefore sought the following damages:

(a) loss of dependency under s 7 of the Civil Law Act 1956;

(b) loss suffered by the estate under s 8 of the Civil Law Act 1956;

A (c) general damages;

(d) special damages;

(e) damages for assault and battery;

B (f) exemplary damages;

(g) aggravated damages; and

(h) damages for misfeasance in public office.

C THE HIGH COURT DECISION

[19] At the High Court, the learned JC, after full trial, had allowed the plaintiff's claim in part.

D **[20]** In the instant case, the deceased was detained for a total of 24 days before his demise. The deceased was never released from the time he was arrested on 13 February 2014 to the time of his death on 8 March 2014. During that entire period of time he was under the custody and care of the defendants, their servants or agents.

E

[21] In gist, the learned JC found that there was indeed a duty of care owed to the deceased by the police and prison authorities. At this juncture the learned JC had emphasised that the duty of care owed is distinct from the legality of the remands and detention imposed upon the deceased.

F

[22] The period of detention of the deceased can be separated into two parts. The first part would be when he was under remand under s 117 of the CPC. This would cover the period from 13 February 2014 to 4 March 2014. The second part would be his detention prior to the deceased's transfer to the Tapah Prison after being sentenced.

G

[23] At this juncture, it is important to state that the authenticity of all the documents produced with regards to the remand of the deceased from 13 February 2014 to 6 March 2014 were not disputed.

H

[24] At the end of the trial, the learned JC made the finding which can be summarised as follows:

I (a) there are various remand applications. In respect of the first remand, the 'Minit Reman' in D37 did not state when the remand would commence, more importantly, the magistrate did not state the reasons for the detention in both the 'Permohonan' and 'Minit Permohonan' as required by the relevant Practice Direction;

(b) with regards to the remand period from 18 February 2014 to 21 February 2014, (the second remand) in respect of the 'Minit Permohonan Reman' (D39(a)) and 'Permohonan Sambung Reman' (D39(b)) it is to be noted that although D39(a) mentioned that the deceased had been detained prior to the second remand sought but there is no specific indication that the magistrate ordering the remand took this factor into consideration as required by s 117(4) of the CPC. Further, D39(a) does not indicate as to when the remand is to commence and for how long. This has to be seen in the light of the fact that the second remand application D39(b) was supported by one ASP Hasan Mohd Salih and dated 15 February 2014, which suggested that it was prepared only one day after the first remand was obtained. Neither did the magistrate indicate as to the treatment of the deceased during the custody period as this space was left blank. Exhibit D39(a) shows that the magistrate did not record his reasons for authorising the extension of the detention of the deceased as required under s 117(7) of the CPC as this space too was left blank. In the absence of the reasons for the further remand, the whole remand proceedings were a mechanical one. It is a duty of the officer applying the remand to ensure that the remand application and remand order is given in strict compliance with the law;

(c) in respect of the third remand, upon perusal of the 'Permohonan Reman' D46(1), it is stated that the deceased was detained from the 13th to the date he was brought for the third remand. This was obviously made in breach of s 117(3) of the CPC. The magistrate, therefore had failed to take into account any period of detention prior to the remand application. In other words, the magistrate cannot be said to have exercised his discretion judiciously as the full facts of the case was not before him;

(d) with regard to the fourth remand, SP3 did bring to the magistrate's attention that the deceased had been detained prior to the application on the 26 February 2014. Yet a further remand of three days was given to the police. Again, the magistrate did not state the reasons for extending the period of detention. Thus, the remand order was obtained not in accordance with ss 117 and 119 of the CPC and also the relevant Practice Direction;

(e) further, it is noted that none of the police diaries in this case had complied with all the requirements of s 119(1) of the CPC. The net effect would be that the magistrate would not have had the opportunity to make an informed decision and to consider the remand application judiciously (*Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477; [1997] 4 CLJ 702, *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 7 CLJ 403);

(f) it is undisputed fact that the deceased was not sent to Tapah prison immediately to serve his sentence. Instead he was detained at the lockup at Seberang Prai Tengah. He was only sent to Tapah Prison two days later on 6 March 2012. The reason was that the Tapah Prison would not accept prisoners after 5pm and there was a shortage of escorts at the material time. This was stated by SD10 in evidence. In this respect no evidence adduced that Tapah Prison Authorities had imposed the said condition. In addition, there was no documentary evidence or otherwise led to show that there was shortage of escorts. Thus, these reasoning are unacceptable. Imperatively, the dispatching of the deceased to Tapah Prison immediately after the sentence is required in s 282 of the CPC and s 54(2) of the Interpretation Acts 1948 and 1967 which states as follows:

> (1) ...
>
> (2) Where no time is prescribed within which anything shall be done, that thing shall be done *with all convenient speed* and as often as the prescribed occasion arises. (Emphasis added.)

The fact that no cogent reason was given as to the further detention of the deceased at lockup makes his detention there unlawful and in breach of the committal order issued by the magistrate on 4 March 2014 pursuant to s 282 of the CPC;

(g) after having analysed the facts and evidence, the detention of deceased during the remand period was unlawful and amounted to an abuse of power. Therefore, the fifth, sixth, seventh and eighth defendants had committed public misfeasance;

(h) in respect of the cause of death, the post mortem report clearly stated that 'Jangkitan pada Paru-Paru (Chest infection)'. This finding was supported in the Coroner's finding of 'misadventure' and the death of the deceased was due to chest infection; and

(i) the plaintiff's contended that the cause of death of the deceased was due to the beating he had during the period he was under remand. In short, the deceased died of a condition called Rhabdomyolysis which is due direct or indirect muscle injury from the purported beatings he endured during the remand period. The learned JC had accepted the view of SD19, the pathologist, that much would be dependent on what the patient complained to the doctor, and also the doctor having made aware of the symptoms or history by the patient to order further examination so as to detect illness other than the one complained of without the symptoms or history being made known, the doctor would not be inclined to examine further and therefore detect the underlying chronic illness. However, this does not excuse the first, second, third and fourth defendants from their duty of care towards the deceased especially so when the deceased as newly arrived prisoner and was placed in the 'Block

Kuarantin' where according to the letter dated 21 March 2005 from the Pengarah Keselamatan (D67) the prison authorities are to exercise more vigilance on those prisoners in the 'Block Kuarantin'.

[25] The learned JC concluded that the plaintiff has succeeded in proving on a balance of probabilities the following:

(a) the fifth defendant had breached his duty of care which was owed to the deceased and that the death of the deceased was due to their negligence in failing to provide a medical officer to examine him upon his confinement in the lockup and keep proper observation on him to ensure his good health. Further to this, r 10 of the Lockup Rules 1953 had also been breached;

(b) the first, second, third and fourth defendants at Tapah Prison had also failed to make proper watch on the deceased when they ought to know that he was unwell. No monitoring and proper observation of his health was made whilst he was in cell G4 in Block Insaf. They had carried out their duties in a manner which was detrimental to the wellbeing of the deceased. They also failed to provide emergency treatment at the Tapah Prison on being informed that the deceased was 'tidak sedar diri'. Further reg 272 of the Prison Regulations 2000 was not adhered to; and

(c) the fifth, sixth, seventh and eighth defendants had assisted in the abuse of the remand process of the deceased in a manner that he endured unlawful imprisonment from 14 February 2014 to 6 March 2014.

[26] Based on their respective conduct, the learned JC concluded that negligence, false imprisonment, and public misfeasance had been established against the defendants. The tenth to the 13th defendants were vicariously liable for the conduct of the first to eighth defendants.

[27] The damages awarded are as follows:

(a) funeral expenses — RM2,000;

(b) public misfeasance — RM50,000;

(c) false imprisonment — RM100,000;

(d) exemplary damages — no award;

(e) loss of support — not allowed;

(f) special damages — not allowed;

(g) damages for assault and battery — not allowed;

(h) aggravated damages — no award; and

(i) cost — RM12,000.

THE APPEAL

[28] Before us, the learned counsel for the plaintiff had canvassed six grounds of appeal for our determination. They are:

(a) whether the plaintiff is entitled to loss of dependency under s 7 of the Civil Law Act 1956

(b) whether the plaintiff is entitled to bereavement;

(c) whether the plaintiff is entitled to exemplary damages;

(d) whether the plaintiff is entitled to aggravated damages;

(e) whether the plaintiff is entitled to special damages; and

(f) amount of costs awarded to plaintiff is extremely low.

[29] Whilst the defendants enumerated 18 grounds which can be summarised into three core grounds as follows:

(a) legality of the detention of the deceased;

(b) were the defendants negligent in causing the death of the deceased? and

(c) can the defendants be held liable for breach of statutory duty despite the failure of the plaintiff to specially plead statutory provisions which were said to have been breached by the defendants?

OUR DECISION

[30] Given that the respondents have, in Appeal No 71 pivoted their appeal on the issue of liability chiefly on the non-illegality of the detention, we are of the considered view and it is opportune for us to deal with this issue first, which we now deal as hereunder.

Issue (a): Legality of the detention of the deceased

[31] It is not in dispute that the deceased was detained for a total of 24 days before his demise. The deceased was never released from the time he was arrested on 13 February 2014 to the time of his death on 8 March 2014. During that period of time he was under the custody of the defendants, their servants or agents.

[32] As we have alluded to above, the learned JC came to a finding that the detention of the deceased for this period is unlawful.

[33] On this point, the learned JC had referred to the decision of Federal Court in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 7 CLJ 403 which stressed the importance of adherence to ss 117 and 119 in particular the following paragraphs:

> [73] We are in agreement with the Court of Appeal that the first remand order as well as the subsequent extension were obtained by the police from the magistrate (s) without the third and fourth appellants duly complying with the safeguards laid out in law for the remand orders to be issued. We are constrained to say that if the requirements of ss 117 and 119 of the CPC had not been complied with how then, can the magistrate make an informed decision as to whether to issue or not the remand order. The magistrate has to satisfy himself as to the necessity of the order and that the period of detention also ought to be restricted to the necessities of the case (*Bal Krishna vEmperror* AIR 93 Lah 99).

[34] The learned SFC for the defendants sought to assail that finding and the reliance on the said case. It was submitted that the first to the fourth remand orders remained valid in law for the reason that the orders were never challenged by the deceased. It was faintly suggested too that it was not opened for the deceased to seek to challenge the legality of the orders through the civil proceedings. Learned SFC further contended that the failure of the 'Minit Reman' to state when the remand would commence and the reasons for the extension of remand orders was not the defendants' fault. Therefore, so long as the remand order was not challenged and ruled defective, thus, the orders remained valid and must be deemed to have been made in accordance with the law. In other words, the defendants' act in detaining the deceased during the first until the fourth remand period would fall squarely within the ambit of s 32 Police Act 1967 and the Criminal Procedure Code.

[35] It was further submitted that the learned JC had misapplied the Federal Court's decision in *Hassan bin Marsom & Ors* which indicates that a detention may only be challenged in very limited circumstances subject to proving of certain elements. There the Federal Court held as follows:

> The High Court, being court of unlimited jurisdiction has an inherent power to correct any wrong that had been done in breach of any written law and to declare the legality or otherwise of any act purportedly done or exercised pursuant to powers conferred under the law.

[36] We think that the learned SFC's submission stretches too far. In our judgment, the submission is valid on the limited point on the pleadings which the learned JC had overlooked. A careful perusal of the pleadings showed that the plaintiff did not pray for any declaratory relief that the arrest and detention were unlawful. The plaintiff merely averred on the unlawfulness of the arrest and/or detention in para 21(a) of the statement of claim ('SOC') but the particulars on the unlawfulness of the arrest and detention were not pleaded in

the SOC. In similar vein, relief on the wrongful arrest and detention either in the form of declaration or damages was also not prayed. It is well settled that parties are bound by their pleadings — *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415. So too here. The plaintiff's claim must fall to be decided based on the pleadings. The learned JC unfortunately has missed this point of procedure. Accordingly, where the trial court went beyond what was claimed in the SOC, then the judgment being contrary to the pleading become untenable in law and liable to be set aside — see Buttrose J in *Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71.

[37] In view of the position that we have taken we find it unnecessary to make a finding on whether the detentions are unlawful or that the lawfulness of any detention can only be challenged at the time of detention and not by way of a civil action although we must at once doubt the correctness of that proposition advanced by the learned SFC. We should also like to point out that the courts have generally taken a dim view of detentions in the nature of 'roadshows' (where a suspect is taken from one police station to another soon after the expiry of the remand) or colloquially referred to as 'tukar gari' or change of handcuffs from one police station in one jurisdiction to another. We must say that the days of police investigation premised on securing admissions are relics of the past and that a charge and conviction must be sustained through a methodical and technical investigations or now known as forensic science. Again, we must emphasise that nothing that we have stated herein should be construed as stating that a claim on the unlawfulness of detention could not be challenged after remand orders have been made. We also do not think that the decision of this court in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15 could lend support to, or be construed as the authority for, the proposition that the validity of remand proceedings could be challenged by way of criminal revision or appeal only. In the present case the plaintiff, unfortunately, was less than careful in his pleading and is thereby precluded from doing so.

[38] That said, at the core of the plaintiff's case is the allegation of negligence on the part of the defendants which we will now examine below.

Issue (b): Were the defendants negligent in causing the death of the deceased

[39] The learned JC, after considering the evidence of the plaintiff's witnesses, was satisfied that the plaintiff had succeeded in proving on a balance of probabilities the following:

(a) the fifth defendant had breached his duty of care which was owed to the deceased and that the death of the deceased was due to his negligence in failing to provide a medical officer to examine him upon his confinement in the lockup and keep proper observation on him to ensure his good health. Therefore, r 10 of the Lockup Rules had been breached;

(b) the first, second, third and fourth defendants at Tapah Prison had also failed to make proper watch on the deceased when they ought to know that he was unwell. No monitoring and proper observation of his health was made whilst he was in cell G4 in Block Insaf. They had carried out their duties in a manner which was detrimental to the wellbeing of the deceased. They also failed to provide emergency treatment at the Tapah Prison on being informed that the deceased was unconscious or 'tidak sedar diri'. Therefore, reg 272 of the Prison Regulations was not adhered to; and

(c) the fifth, sixth, seventh and eighth defendants had assisted in the abuse in the remand process of the deceased in a manner that he endured unlawful imprisonment from 14 February 2014 to 6 March 2014.

[40] Before us, the learned SFC submitted that the defendants have not breached their duties of care while discharging their duty at the material time. The learned JC opined that there was a duty of care on the part of the defendants toward the deceased by relying on *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15 and *R (on the application of Amin) v Secretary of State for the Home Department* [2003] 4 All ER 1264; [2003] UKHL 51. It was submitted by the learned SFC that the reference made by the learned JC to the both cases was plainly wrong. Learned SFC further submitted that the test laid down in *Caparo Industries plc v Dickman and others* [1990] 2 AC 605 which has long been accepted and applied by Malaysian Court plays a vital role in assisting this court in this instant appeal. Further, the Federal Court in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 has adopted the test of foreseeability, proximity and policy consideration as expounded in the House of Lords in *Caparo Industries*. The court viewed as follows:

> [44] To put it in a nutshell the preferred test is the threefold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The threefold test has been recognised by the House of Lords in *Caparo Industries plc v Dickman and others* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp 617–618. His Lordship said that:
>
> > What emerges is that in addition to the foreseeability of damage necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship

A characterised by the law as one of proximity or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

B **[41]** The learned SFC further submitted that the deceased had never made any complaint on his health. Neither was there any complaint from the police, the prison officer nor from the other prisoners living in the same block as the deceased in Tapah Prison.

C

[42] With respect, we are not persuaded with the learned SFC's submissions on this point. There is nothing magical on the formulations of the test to be applied in determining whether a duty of care exists at common law. All the authoritative texts on the subject had alluded to the development in law of D which could be traced back to the case of *Heaven v Pender* (1883) 11 QBD 503 which the first attempt at rationalisation of the law of negligence and followed by the seminal decision on *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 where the 'House of Lords set the law on the new principal part of development' — see *Charlesworth & Percy on Negligence* (13th Ed), at p 22. See E too *Clerk & Lindsell on Torts* (21st Ed) at p 823; *Winfield & Joliwicz on Tort* (19th Ed) at p 85. Of course the exact formulation on the duty of care is still subject to much debate, as can be seen from the cases of *Anns v Merton London Borough Council* [1978] AC 728 and the criticism that the said decision received from the later decisions, amongst which in *Yuen Kun Yue v Attorney* F *General of Hong Kong* [1988] AC 175 and *Caparo Industries* itself. In gist the issue is whether the test on determining a duty is premised on a two-tier or three-test, the former being advocated in *Anns*, whilst the latter being the result of the analysis in *Caparo Industries*. There is of course yet another aspect in the issue: whether the test in *Caparo Industries* ought to be confined to cases G involving pure economic loss and not to be applied in all cases of negligence. The Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 has answered that question in the affirmative and our Federal Court in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561; [2018] 6 CLJ H 683) speaking through Zainun Ali FCJ had this to observe:

> [75] It could be observed that the ingredients giving arise to the existence of a duty of care as expounded in *Spandeck* are not dissimilar to the law in England. Applying the incremental approach, both jurisdictions take a restrictive approach in the I development of the law of negligence. Nevertheless, unlike the decisions in *Caparo* and *Murphy*, *Spandeck* took a step further by recognising these ingredients of foreseeability, proximity of relationship and policy consideration as general principles that will serve as a guide for all cases. Hence general principles are to be applied for a smooth evolution of the law of negligence, such that it is not unduly hampered by an over-reliance on precedents as happened in England.

> [76] As a matter of interest, *Spandeck* imposes a 'single test' or universal test in all negligence cases which makes all claims for damages arising from negligent conduct now becoming more restricted, regardless of whether the plaintiff sustained physical damage or pure economic loss, and irrespective of whether the loss arose from a negligent misstatement or negligent physical act/omission.

[43] As a result there is no uniformity in cross jurisdictions on the proper test to be used. Discerning practitioners will benefit from the discussions from the cases as we have benefited from reading literature on the subject — see para 2-22 of *Charlesworth & Percy.* The long and short of the discourse is that there is no rigid formulation and that there should be an approach towards incrementalism in the determination of whether a duty exist in a particular fact pattern. We find the following to be the correct statement on the point — *Charlesworth & Percy*, para 2-25:

> In broad summary, the leading cases indicate the law favours an incremental approach to analysing negligent conduct in most new factual situations, that is one which builds upon and proceeds from past decisions. To the extent that a decision is required in a novel or borderline case, where the duty question is not covered by authority, the usual analysis will be to ask whether the harm to the claimant was foreseeable, whether the parties were at the material time in a relationship of proximity or neighbourhood, and whether it is fair, just and reasonable taking into account the relevant policy concern, that a duty of care should be recognised in all circumstances of the case.

[44] In the present case we are not dealing with a novel or borderline case. In Malaysia, neither the police nor the prison authorities enjoy immunity from a civil claim for negligence. So too the personnel in the discharge of their duties. Cases on this point are aplenty and there is no necessity for us to state them. It is plain as pikestaff or as night follows day.

[45] Now, in establishing that a duty of care existed in a particular case, as we have stated earlier, the claimant may either prove that such a duty is imposed by a statute or that duty can be said to have existed at common law using the formulation as we have discussed above. Upon perusal of the evidence adduced by the plaintiff, we are in agreement with the learned JC that the plaintiff had established that there was a duty of care owed by the respective defendants to the deceased and that the defendants had breached that duty.

[46] The plaintiff's pleaded case is summarised as follows:

(a) the fifth, sixth and seventh defendants were negligent and or were in dereliction of their duties and responsibilities in the arrest and/or detention and/or investigation in respect of the deceased;

(b) the eighth defendant was negligent and or was in dereliction of his duties and responsibilities in the care and/or control and/or supervision of the police lockup at the Ibu Pejabat Polis Daerah Seberang Prai Tengah; and

(c) the first, second, third and fourth defendants were warders and guards at Tapah Prison. They were negligent and/or were in dereliction of their duties and responsibilities in the care and or control and/or supervision of the Tapah Prison.

[47] As we have alluded, the facts showed that the deceased was detained for a total of 24 days before his demise. The deceased was never released from the time he was arrested on 13 February 2014 to the time of his death on 8 March 2014. During that period of time he was under the custody of the defendants, their servants or agents.

[48] We must say at once that there is duty of care on the part of the detaining authority to ensure the welfare and well being of the person under detention, in the physical as well as the mental aspects. That must, in our considered view, include the duty to ensure that medical treatment or care is available and to be provided readily to the detained person in a given circumstances. This would necessarily mean that the detaining authority must be sensitive or not take an attitude of careless to the needs of the detained person. Every cry of pain cannot be brushed aside as being a silly cry for attention. It could well be an actual cry of pain. The fact that a person is being detained either in prison (serving a sentence) or in lock up (pursuant to a remand order) does not and cannot be construed as giving the detaining authority to trifle with the said persons due and constitutional right to life, in particular, of the right to be treated with dignity. There is a duty on the part of the detaining authority to ensure that the detained person be given a decent meals and medicines and be given medical treatment by competent medical personnel and medical aid at the earliest opportunity when required. He must also not be denied of his medicines. The other facet of duty of the detaining authority and its personnel is to ensure that no physical harm is inflicted upon the person detained. Such action of assault or battery cannot be legitimised under any name or guise. Any such action, if committed will tantamount to the strangulation of the rule of law and an insult to the very essence of human dignity and the very office that the perpetrators occupy. We must say in no uncertain terms that brutality is not acceptable and has no part in any criminal investigation and death in custody is an anathema or antithetical to humanity. There is a general duty on the part of the detaining authority to protect and ensure that no violence or abuse is visited upon by the detained person by any one including the detaining authority itself, as the gaoler is not to be oppressor for that is the story of the pagans and not the accomplished story of humanity.

[49] In this context the learned JC was not wrong in premising the duties

not only on the existence of the common law duties but also on the Lockup Rules 1953 and the Prison Regulations 2000, where the following provisions are relevant to the present case:

(a) r 10 of the Lock-up Rules 1953states as follows:

> The Medical officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall certify whether the prisoner is fit for imprisonment and, if convicted the class of labour which he can perform.

(b) reg 7 of the Prison Regulations states:

> That in every prison an infirmary or proper place for the reception of sick prisoners shall be provided.

(c) reg 18 of the Prison Regulations 2000 states:

> Medical examination
>
> (1) Every prisoner shall, as soon as possible after his admission, be separately examined by the Medical Officer, who shall enter in the Prisoner's Record particulars of the prisoner's state of health and any other particulars as he may deem necessary.

(d) further reg 272 state the following:

> Prisoners who appear to be in ill-health. Every prison officer shall direct the attention of the Officer-in-Charge to any prisoner who may appear not to be in health, although not complaining of sickness, or whose state of mind way appear deserving of special notice and care, in order that the opinion and instructions of the Medical Officer may be taken on the case.

[50] Upon perusal the record of appeal, we find not an iota of evidence that the deceased was examined by a medical officer when he was first detained at the lockup. Although r 10 of the Lockup Rules states 'so far as possible' there was nothing by way of explanation by the defendants why such medical examination could not be provided. It is clear that SD2 never referred the deceased to any medical officer at any time. When the deceased was transferred to the Tapah Prison, it seemed that reg 18 of the Regulations had been satisfied when SD18 examined the deceased.

[51] SD18 had prescribed medication to the deceased for the diarrhoea:

> The medication provide was as follows:
>
> I prescribed lommatil to stop diarrhoea one, I give him 1 bd, 1 tablet twice a day just for 2 days. ORS is a salt, 1 sachet twice a day and 1 small pack twice a day and Buscopan is to stop the abnormal pain and bowel movement 1 tablet twice a day.

[52] SD18 testified during the inquest that his job was only to prescribe and

not to dispense. The monitoring ought to have taken place in accordance with reg 272 but was not done. There was no procedure for the follow up of the medical examination. If this was done it would be probable that the defendants at Tapah Prison would have noticed that the deceased was unwell and was in need of treatment for something more serious than diarrhoea. In similar vein, the cell in which the deceased was placed was well lighted and there were around 30 other inmates in the cell G4. There was checking of the prisoners every half hour from 9pm on 7 March 2014 to 6.15am 8 March 2014 as evidenced from the Tapah Prison Buku Harian (D64). Unfortunately, after multiple rounds, the wardens did not see and act on the situation where the deceased was lying sprawled on the floor face down when such a position would have aroused some suspicion that something was not right with this prisoner. It was in evidence that SD12 found the deceased in a state of 'tidak sedar' at 6.15am on 8 March 2014. Whilst SD13 found the deceased in a state of 'tertiarap' or sprawled face down.

[53] In light of the above circumstance we agree with the learned JC that the first, second, third and fourth defendants had breached both their common law duty of care and the statutory duty imposed on them whilst the deceased was in Tapah Prison. They were negligent in their performance of their public duty by omission to ensure the medication prescribed would reach the deceased and no attempt was made to give the deceased emergency treatment.

[54] In conclusion, we are of the considered opinion that the facts in the case of *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365; [2021] 3 MLR 424 are almost similar to the present case. The deceased in that case, Chandran a/l Perumal, having been arrested and detained by the police, did not afford Chandran the necessary care and medical attention he required and subsequently died in custody. The defendants in *Koperal Zainal* were subsequently held to be liable for the death of Chandran a/l Perumal due to their negligent conduct. In our case the deceased has been subjected to the long process of interrogations by a different team of the investigators. Under such a long detention and interrogations will certainly affected his mental and health condition. In other words, his health condition has deteriorated. Nobody in the police care about this. Eventually he was placed in the prison cell. On 7 March 2014 he complained of stomach pain and suffered from diarrhoea. He was taken to see SD18. SD18 then prescribed medicine for two days. Subsequently he was taken back to his cell but was found unconscious the next morning at 6.15am 8 March 2014. No evidence was led on who kept his medicines or whether the deceased was ever reminded to take his medicines or any follow up on that. The only conclusion which can be drawn, for which the JC cannot be faulted was the 'tidak apa' attitude of the prison guards. Such was the appalling state of this case.

[55] We agree that the deceased's illness of 'radang paru-paru' cannot just develop in one night. In light of the facts of this case, we are in agreement with the finding that the deceased had been deprived of any medical attention contrary to the provision of r 10 of the Lockup Rules. Thus, the fifth defendant had was breached the duty of care which was owed to the deceased due to his negligence in failing to provide a medical officer to examine him upon his confinement in the lockup and to keep proper observation on him to ensure his good health. Whilst the first, second, third and fourth defendants at Tapah Prison had also failed to take proper watch on the deceased when they ought to know that he was unwell. The tenth to 13th defendants were found to be vicariously liable for the conduct of the first to fifth defendants.

[56] Based on their respective conduct, we are of the view that the finding of negligence by the JC is supported by evidence. We also find that the award of RM250,000 as damages to be appropriate.

RELIEFS

[57] As stated earlier, the learned JC had disallowed the plaintiff's claim for the following:

(a) claim for dependency pursuant to s 7 of the Civil Law Act 1956

(b) claim for special damages; and

(c) amount of cost awarded.

Dependency claim

[58] The plaintiff and her husband are father and mother of the deceased. They had testified that on average the deceased had a monthly earning of RM2,500 a month. Both the plaintiff and her husband (SP2) had testified that they received a sum totalling about RM1,000 to RM1,300 from the deceased as monthly support. The deceased had worked in a sugar factory 'Balamunis Enterprise' as general worker since June 2013. The 'Employment Confirmation' from Balamunis Enterprise copies of the Pay Advice for Kamarulnizam bin Ismail, the deceased, and a copy of his EPF by the Kumpulan Wang Simpanan Pekerja showed that contribution had been made for January 2014 can found respectively at p 986, at pp 987–994 *Rekod Rayuan, Bahagian C — Jld 2*, and at p 913 *Rekod Rayuan, Bahagian C — Jld 1*.

[59] The deceased also had been working part time at a fruit stall for one Encik Mohammad Syaarni bin Shahhabudin (SP5). A copy of the 'Employment Confirmation' from SP5 as at p 1001 *Rekod Rayuan, Bahagian C — Jld 2*. Upon perusal the aforesaid Record of Appeal we found that the evidence that the deceased had indeed been gainful employed and was earning

RM2,500 a month as provided by s 7(3)(iv) of the Civil Law Act 1956, was substantiated by the contemporaneous document produced during the trial. Therefore, we are of the view that the learned JC had erred in his finding that the deceased was not employed by either SP4 or SP5. In addition, the fact that the deceased owned the car was never challenged by the respondent.

[60] The plaintiff had pleaded that the deceased earned more or less around RM2,500 a month. It is a rough estimate of the approximate earnings that the deceased earned each month. Therefore, to our mind, just because the earning did not command a monthly salary of RM2,500 the plaintiff's evidence that the deceased gave her and SP2 a monthly subsistence should not be disbelieved at all. We are of the view that there had been insufficient judicial appreciation of the evidence when the learned JC decided against awarding any sum for dependency to the plaintiff.

[61] In the present case we are satisfied that based on the evidence and using the established method of assessment in personal injury litigation as the benchmark, the sum of RM1,500 would be the likely monthly income of the deceased. We, therefore, find the figure of RM212.50 per month is reasonable for the dependency claim. The working formula for the calculation of the appropriate sum for dependency is as follows:

Multiplicand:

RM212.50 x 12 x 16 = RM40,800 with interest of 5% from the date of the order until realisation.

[62] The learned JC had also rejected the plaintiff's claim of RM20,000 being the expenses 'to travel to Ipoh to attend the Coroner's Court for the inquest proceedings'. The plaintiff's has pleaded in her statement of claim at p 57 of the *Rekod Rayuan — Bahagian A* the following:

> *Butir-Butir Gantirugi Khas*
>
> b. Perbelanjaan perjalanan dari Pulau Pinang ke Ipoh serta makan dan minum bagi menghadiri kes siasatan inkues serta semua urusan lain yang berkaitan dengan kematian simati RM20,000.00.

[63] We believe that the plaintiff no doubt has spent some money as costs for travelling to and from Penang as well as for other matters pertaining to the deceased's death. This would necessarily include all the expenses in obtaining the letters of administration, obtaining reports and so on. As such we are of the view that the sum of RM10,000 for special damages is reasonable. Therefore, we allowed the sum of RM10,000 for these expenses.

Costs

[64] After full trial, the learned JC had awarded RM12,000 for costs to the plaintiff. The plaintiff submitted that the full trial had been a lengthy process, involving 15 days over the course of one year just for trial itself not inclusive of dates for case management, postponements and making submission.

[65] It is trite law that the question of costs to be awarded in any particular case depends is a matter of direction the judge — see *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147. Paragraph 15 of the Courts of Judicature Act 1964 dispels any doubt about the power of the court to award costs. That has been confirmed in a catena of cases and no useful purpose will be served by us regurgitating those case. We should however like to stress that it is also trite that as in any other discretion, the exercise of which must be subject to settled principles and be exercised judicially. Once that discretion is not exercised judicially the appellate court is entitled to interfere.

[66] One of the settled principles of the exercise of discretion to award costs to the successful party is to look at the amount of time and efforts expanded by that party to the litigation. In the present case we find that the costs awarded by the learned JC is in ordinately low compared to the amount of time and expenses that had been incurred by the plaintiff in pursuing his claim. We therefore set aside the order of costs made by the trial judge. Having considered all the facts and taking into account all the relevant principles, we are of the considered view that a sum of RM30,000 is fair and reasonable in the circumstances.

CONCLUSION

[67] In the upshot, the Appeal No 463 is allowed partly with costs of RM5,000 to be paid to the plaintiff subject to allocator whilst the Appeal No 71 is dismissed with each party to bear their own costs.

Appeal No 463 allowed and Appeal No 71 dismissed.

Reported by Ahmad Ismail Illman Mohd Razali